Supreme Court, U.S.
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No. 04-

In the
Supreme Court of the United States

MARTIN PRUITT, LUCRETIA PRUITT, DAVID ELGIN, DANIEL LLEWELLYN AND CHERYL LLEWELLYN,
Petitioners,

v.

COMCAST CABLE HOLDINGS, LLC,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Tenth Circuit Court of Appeals err in holding that the Petitioners could not pursue claims regarding the retaining of information in violation of the Cable Communications Policy Act because the Petitioners did not specifically allege that the means by which the information was personally identifiable to them also violated the Act?

a. To establish a claim that the retaining of certain "personally identifiable information" violates the Cable Communications Policy Act, must a plaintiff specifically allege that the means or methods by which the information was personally identifiable also violates the Act?

b. Can the retaining of "personally identifiable information," in violation of the Cable Communications Policy Act, be the subject of a private civil action, where the means or methods by which the information is personally identified are not, in themselves, in violation of the Act?

c. Can a claim that the retaining of certain "personally identifiable information" violates the Cable Communications Policy Act be established, if it is proven that the information can be identified to a particular subscriber?

PARTIES TO THE PROCEEDING

The parties to the proceeding are Petitioners Martin Pruitt, Lucretia Pruitt, David Elgin, Daniel Llewellyn and Cheryl Llewellyn, and Respondent Comcast Cable Holdings, LLC.

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OPINIONS BELOW

The June 3, 2004, opinion of the United States Court of Appeals for the Tenth Circuit is reported at 100 Fed.Appx. 713, 2004 WL 1226935 (10th Cir. (Colo.)), and is reprinted in the Appendix at App. 1a-8a. The June 6, 2003, order of the United States District Court for the District of Colorado is reprinted in the Appendix at App. 9a-24a.

STATEMENT OF JURISDICTION

The Tenth Circuit issued its opinion on June 3, 2004. This Petition for Certiorari is timely in that Petitioners have filed it within 90 days of June 3, 2004. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves interpretation and application of privacy protections of the Cable Communications Policy Act, 47 U.S.C. § 521 *et. seq.* (the "Cable Act"). The privacy protections of the Cable Act are found at 47 U.S.C. § 551. 47 U.S.C. § 551(b) and (e) are the relevant sub-sections of the Cable Act involved in this Petition.

47 U.S.C. § 551(b) provides:

> (b) Collection of personally identifiable information using cable system
>
> (1) Except as provided in paragraph (2), a cable operator shall not use the cable system to collect personally identifiable information concerning any subscriber without the prior written or electronic consent of the subscriber concerned.

(2) A cable operator may use the cable system to collect such information in order to –

(A) obtain information necessary to render a cable service or other service provided by the cable operator to the subscriber; or

(B) detect unauthorized reception of cable communications.

47 U.S.C. § 551(e) provides:

(e) Destruction of information

A cable operator shall destroy personally identifiable information if the information is no longer necessary for the purpose for which it was collected and there are no pending requests or orders for access to such information under subsection (d) of this section or pursuant to a court order.

STATEMENT OF THE CASE

The Petitioners are past or present subscribers of the Respondent's digital cable service. App. 2a. In order to receive the digital cable service, subscribers are required to have special converter boxes installed in their homes and attached to their telephone lines. *Id.* The converter boxes collect and store pay-per-view purchase information. App. 2a-3a. The information collected by and stored in the converter boxes reveals the dates and times of pay-per-view purchases and the pay-per-view channels watched. App. 3a. The converter boxes also record and store the total number of purchases and total cost of those purchases. *Id.* Subscribers' names and addresses are not stored in the converter boxes.

Id. Instead, a list of their names and addresses is maintained in the Respondent's billing system. *Id.* In order to be able to identify the particular subscriber to whom viewing and purchase information relates, an identifying number known as a "unit address" is kept in the converter boxes. *Id.* The unit address functions as a key which matches the information in a converter box to a particular subscriber's name and address in the billing system.

The Petitioners filed suit in the United States District Court for the District of Colorado, asserting that the information collected by the converter boxes was personally identifiable, and that the Respondent never destroyed the information in violation of the privacy provisions of the Cable Act. The District Court had original jurisdiction over the Petitioners' Cable Act claims pursuant to 47 U.S.C. § 551(f)(1) and 28 U.S.C. § 1331. On June 6, 2003, the District Court issued its Order dismissing the Petitioners' claims. App. 9a-24a. In so doing, the District Court held that the purchase information collected and stored by the converter boxes was not personally identifiable because subscribers' names and addresses were not stored in the converter boxes, even though the information could be matched with subscribers' names and addresses in the billing system. App. 21a.

The Petitioners appealed the District Court's ruling to the United States Court of Appeals for the Tenth Circuit. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291. The Court of Appeals affirmed the District Court's ruling.

The Court of Appeals acknowledged that the information regarding pay-per-view purchases stored in the converter boxes could be matched to records of particular, individual

subscribers stored in the Respondent's billing system, by means of the unit address. App. 3a. The Court of Appeals, however, held that the information in the converter boxes was not personally identifiable because the Petitioners did not claim that the collection of their names and addresses in the billing system violated the Cable Act. App. 6a. In such regard, the Court of Appeals held that "[a]bsent any allegation that the retention of data in the billing or management systems violates the Cable Act, we agree with the district court that the converter boxes contain no personally identifiable information." App. 7a.

REASONS FOR GRANTING THE PETITION

I. The United States Court of Appeals for the Tenth Circuit has incorrectly decided an important question of federal law that has not been, but should be, settled by the United States Supreme Court.

The Cable Act establishes national policy and guidelines for the cable television industry. *Scofield v. Telecable of Overland Park*, 973 F.2d 874, 876 (10th Cir. 1992). Included in the Cable Act, at 47 U.S.C. § 551, is a self-contained and privately enforceable scheme for the protection of cable subscriber privacy. *Id.* Congress has specifically noted the importance of protecting the privacy of cable subscribers in connection with national cable legislation. H.R.Rep. No. 934, 98th Cong., 2d Sess. 29 (1984) U.S.Code Cong. & Admin. News 1984, p. 4667. In such regard, Congress recognized that such privacy issues "raise a number of Federal concerns, including protection of the subscribers' First, Fourth, and Fifth Amendment rights." *Id.* One of the most important functions of 47 U.S.C. § 551 is that it limits the ability of cable companies to peer in on their subscribers and collect personal information such as subscribers' viewing

habits and the nature of transactions they make over the cable system. *Scofield*, 973 F.2d at 876.

The Court of Appeals' decision turns on its interpretation of the phrase "personally identifiable information," which is a concept underlying all of the privacy protections of the Cable Act. To date, the lower courts have avoided affirmatively defining the term "personally identifiable information." *See Scofield supra; Metrovision v. Livonia, Inc.*, 864 F.Supp. 675 (E.D. Mich. 1994). This approach has led to contradictory results. For example, in *Metrovision*, the District Court listed information showing that a subscriber watched adult programming and pay-per-view programming as an example of personally identifiable information. *Id.*, at 618, fn 3. It is this exact same type of information which is at issue in this matter, yet the Court of Appeals herein reached the opposite result.

As noted above, the information regarding the Petitioners' viewing habits and purchases, kept in the converter boxes, was identifiable to the Petitioners by means of a numeric identifier known as a unit address. App. 3a. Rather than address the question of whether the ability to identify the person to whom the information related made that information "personally identifiable," the Court of Appeals focused on the physical location of the names and addresses. *See* App. 6a. Contrary to the approach taken by the Court of Appeals, however, there is no requirement under the Cable Act that subscribers' names and addresses be stored in the same location as the information at issue in order for the information to be personally identifiable. The Cable Act requires that the person to whom the information relates be "identifiable," not that he has necessarily been "identified" in the same converter box which holds the information subject to the Cable Act privacy protections.

The central component of the Court of Appeals' ruling is its holding that, absent an allegation that the list of names and addresses kept in the billing system violates the Cable Act, the viewing and purchase information in the converter boxes is not personally identifiable. App. 7a. This standard, which is not found in the Cable Act, creates a loophole which allows cable companies to avoid each and every privacy protection under the Cable Act. Unless this Court takes action to affirmatively define the term "personally identifiable information" in a way which will adequately protect the privacy rights of subscribers, it will encourage increased violation of subscribers' privacy rights.

1. The standard created by the Court of Appeals would effectively nullify the privacy protections of the Cable Act.

In passing the Cable Act, Congress was concerned that the ability of interactive, two-way cable systems, such as the one at issue herein, to collect and store information about subscribers could reveal personal details regarding subscribers' "bank transactions, shopping habits, political contributions, viewing habits and other significant personal decisions." *Scofield*, 973 F.2d at 876 (quoting H.R.Rep. No. 934, 98th Cong., 2d Sess. 29 (1984) U.S.Code Cong. & Admin. News 1984, p. 4666). Under the standard created by the Court of Appeals, a cable company would be able to collect, store and even sell detailed personal information about subscribers, including all of the types of information listed by Congress, even if that information could be readily identified to particular individuals. All a cable company needs to do in order to circumvent the privacy protections of the Cable Act is link the information to subscribers' names and addresses by means of some identifier such as a unit address or an account number, rather than store it in the same physical record. It

cannot have been the intention of Congress that every privacy protection granted to the public by the Cable Act could be so easily avoided.

2. The standard created by the Court of Appeals would require subscribers to make bad faith allegations in order to pursue violations of the Cable Act.

The District Court focused on the fact that the Petitioners' did not allege in their complaint that the retention of names and addresses in the Respondent's billing system violated the Cable Act. App. 21a. The Court of Appeals agreed with the District Court that such an allegation was necessary in order for the information in the converter boxes to be personally identifiable. App. 7a. Since all of the privacy protections of the Cable Act relate to personally identifiable information, the standard adopted by the Court of Appeals effectively requires a subscriber to allege that the keeping of his name and address is a violation of the Cable Act in order to pursue other, legitimate violations of his privacy rights. Keeping a list of customers' names and addresses, however, is not a violation of the Cable Act. Customers' names and addresses are necessary in order for a cable company to provide and bill for services. Accordingly, a cable company is specifically permitted by the Cable Act to collect and maintain such information. *See* 47 U.S.C. § 551(b) and (e).

3. The standard created by the Court of Appeals is contrary to the notice pleading standard of Fed.R.Civ.P. 8(a).

The Court of Appeals' ruling echoes the emphasis placed by the District Court on the fact that the Petitioners' complaint deals solely with the information collected and stored by the converter boxes, and not the information kept in

the billing system. *See* App. 7a, and 21a. Pursuant to Fed.R.Civ.P. 8(a)(2), a plaintiff must provide only a short and plain statement of the claim showing that the he is entitled to relief. As this Court has noted, all that is required is that a defendant be given fair notice of what a plaintiff's claim is and the grounds upon which it rests. *Swierkeiwicz v. Sorema N.A.*, 534 U.S. 506, 512; 122 S. Ct. 992, 998; 152 L.Ed.2d 1, 9 (2002). The Petitioners asserted that the information in the converter boxes was personally identifiable and was retained in violation of 47 U.S.C. § 551. Such information complies with the requirements of Fed.R.Civ.P. 8(a)(2). There is nothing in the Cable Act which requires subscribers to adhere to a heightened standard of pleading.

CONCLUSION

For the reasons as stated above, the Petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 03-1297

[Filed June 3, 2004]

MARTIN PRUITT, LUCRETIA PRUITT, DAVID ELGIN, DANIEL LLEWELLYN and CHERYL LLEWELLYN, Plaintiffs-Appellants,	)
v.	)
COMCAST CABLE HOLDINGS, LLC, Defendant-Appellee.	)

On Appeal From
United States District Court
for the District of Colorado
No. 00-N-1250
Edward W. Nottingham

Before MURPHY, Circuit Judge, BRORBY, Senior Circuit Judge, and O'BRIEN, Circuit Judge.

ORDER AND JUDGMENT*

Former and current subscribers of Comcast Cable Holdings, LLC's ("Comcast")[1] digital cable service filed suit claiming Comcast violated the 1984 Cable Communications Privacy Act ("Cable Act"), 47 U.S.C. § 551, *et. seq.*, by retaining personally identifiable information in its cable converter boxes without notice or consent. In addition, two subscribers brought related state law claims alleging Comcast charged them for a service not supplied. The district court granted summary judgment in favor of Comcast on the federal claims, holding the information in the converter boxes was not personally identifiable information and dismissing the state law claims without prejudice. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

Background

Martin Pruitt, Lucretia Pruitt, David Elgin, Daniel Llewellyn and Cheryl Llewellyn ("Appellants") are past or present subscribers of Comcast's digital cable service. To receive such service, subscribers must have a special converter box installed and attached to their telephone line. The converter boxes, manufactured by Motorola, transmit and store (1) pay-per-view purchase information, (2) system

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* This order and judgment is not binding precedent except under the doctrines of law of the case, *res judicata* and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

[1] During the the pendency of this action, Appellee changed its name from AT&T Broadband, LLC, to Comcast Cable Holdings, LLC.

diagnostic information and (3) settop bugging information. Each converter box contains a code displayed in hexadecimal format indicating the date of a pay-per-view purchase and a source identifier for the pay-per-view channel. The converter box stores a maximum of sixty-four purchases. When total purchases exceed that number, the newest purchase information overwrites the oldest purchase. The converter box also contains a code (again displayed in hexadecimal format) signifying the total number of purchases and payments generated through that particular box. Individual subscriber information is not contained within the converter box, but an identifying number known as a "unit address" allows Comcast to match the subscriber's purchases to its billing system. The billing system contains the name and address of the household member responsible for payment.

Appellants filed suit claiming Comcast violated the Cable Act by (1) storing personally identifiable information (47 U.S.C. § 551(e)) and (2) storing that information longer than necessary (47 U.S.C. § 551(a)). After reviewing cross motions for summary judgment, the district court held the coded information in the converter boxes was not "personally identifiable," and therefore declined to consider whether Comcast retained that information longer than necessary. Finding the federal questions resolved, the district court dismissed the Pruitts' state law claims without prejudice. This appeal followed.

Discussion

1. Cable Act Claims

We review summary judgment *de novo* applying the same legal standard used by the district court. *Scofield v. TeleCable of Overland Park*, 973 F.2d 874, 878 (10th Cir. 1992).

> Summary judgment is appropriate 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact.' . . . [We] draw all inferences in favor of the party opposing summary judgment, [recognizing] credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.

Jones v. Barnhart, 349 F.3d 1260, 1265 (10th Cir. 2003) (quoting Fed. R. Civ. P. 56(c)). This Court's role "is simply to determine whether the evidence proffered by plaintiff would be sufficient, if believed by the ultimate fact finder, to sustain [the] claim." *Id.* at 1265-66.

"In 1984, Congress enacted the Cable Act to establish national policy and guidelines for the cable television industry." *Scofield*, 973 F.2d at 876. The Cable Act creates a nationwide standard for the protection of subscriber privacy by regulating the collection, use, and disclosure by cable operators of personally identifiable information regarding cable subscribers. In particular, 47 U.S.C. § 551 "establishes a self-contained and privately enforceable scheme for the protection of cable subscriber privacy." *Id.* This section responds to "Congress' observation that: cable systems, particularly those with a 'two-way' capability, have an enormous capacity to collect and store personally identifiable information about each cable subscriber." *Id.* (quoting H.R. Rep. No. 934, 98th Cong., 2d Sess. 29 (1984)). "Subscriber records from interactive systems," Congress noted, "can reveal details about bank transactions, shopping habits, political contributions, viewing habits and other significant personal decisions." *Id.*

Although § 551 regulates cable company practices involving personally identifiable information, exceptions are provided where such information is necessary to render service to the subscriber, § 551(b)(2)(A), or to detect unauthorized reception of cable communications. 47 U.S.C. § 551(b)(2)(B). Even so, such subscriber information must be destroyed when it is no longer necessary for the purpose for which it was collected. 47 U.S.C. § 551(e). Further, § 551(a) of the Cable Act "establishes a set of subscriber notice requirements designed to inform subscribers of . . . the operator's information practices that affect subscriber privacy . . . ." *Scofield*, 973 F.2d at 876.

The heart of this dispute is whether the information stored within Comcast's converter boxes is personally identifiable information. "While the term is not affirmatively defined by the Act, § 551(a)(2)" defines what it is not. *Id.* It provides: "for purposes of this section, the term 'personally identifiable information' does not include any record of aggregate data which does not identify particular persons." 47 U.S.C. § 551(a)(2). "In addition, legislative history [suggests] that personally identifiable information would include specific information about the subscriber, or a list of names and addresses on which the subscriber is included . . . ." *Scofield*, 973 F.2d at 876 (quotation and citation omitted).

Appellants concede the information in the converter boxes does not contain the name, address or any information regarding the customer. However, they maintain the unit address enables Comcast to identify a customer's viewing habits by connecting the coded information with its billing or management system. Because the information in any given converter box is not eradicated when it is recycled to another customer, they conclude the converter boxes contain

personally identifiable information which may never be purged.

In granting summary judgment to Comcast, the district court distinguished the information in the converter boxes from that contained in the billing system. It noted the converter box code—without more—provides nothing but a series of numbers. We agree. Without the information in the billing or management system one cannot connect the unit address with a specific customer; without the billing information, even Comcast would be unable to identify which individual household was associated with the raw data in the converter box. Consequently, it is the billing system that holds the key to obtaining personally identifiable information, not the converter box. Appellants made no claim in their briefs or at oral argument that the collection of information in the billing system violates the Cable Act. Moreover, Comcast's privacy notice to subscribers clearly states the retention policies related to information in the billing system:

> Accounting and billing records are retained for ten years for tax and accounting purposes or until the relevant income tax years for which the document was created has been closed for income tax purposes and/or all appeals have been exhausted. Routine paper records necessary to render or conduct legitimate business activities . . . are kept in accordance with the local cable company's voluntarily adopted document retention program. Paper records such as work orders and records of technical maintenance and service . . . are retained for three years. Subject to applicable law, records relating to involuntary disconnects are kept indefinitely by us or [our] affiliates . . . to facilitate collection and evaluation of creditworthiness and are updated as new information is added.

(Appellants' App. at 95.) Absent any allegation that the retention of data in the billing or management systems violates the Cable Act, we agree with the district court that the converter boxes contain no personally identifiable information and Comcast's privacy notice to subscribers adequately states its billing information policies. Because we conclude the converter boxes contain no personally identifiable information, we need not consider whether Comcast retained such information longer than otherwise necessary. *See* 47 U.S.C. § 551(e).

2. Dismissal of State Law Claims

With regard to Pruitts' assertion that the district court erroneously dismissed their state law contract claims, we find it to be without merit. When the district court correctly dismisses a plaintiff's federal law claims, we review its decision to refuse to exercise supplemental jurisdiction over that plaintiff's state law claims for an abuse of discretion. *See* 28 U.S.C. § 1367(c)(3); *Gold v. Local 7 United Food & Commercial Workers Union*, 159 F.3d 1307, 1310 (10th Cir. 1998), *overruled on other grounds by Styskal v. Weld County Comm'rs.*, 365 F.3d 855 (10th Cir. 2004). While

> the federal courts' original jurisdiction over federal questions carries with it jurisdiction over state law claims that derive from a common nucleus of operative fact, . . . district courts are statutorily authorized to decline supplemental jurisdiction over a state law claim if
>
> > (1) the claim raises a novel or complex issue of State law,

> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
> (3) the district court has dismissed all claims over which it has original jurisdiction, or
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

Gold, 159 F.3d at 1310 (quotations and citations omitted); *see* 28 U.S.C. § 1367(a). The district court's actions were clearly authorized under § 1367(c)(3).

For the foregoing reasons, the district court's judgment in favor of Comcast is AFFIRMED.

Entered by the Court:

Terrence L. O'Brien
United States Circuit Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 00 N 1250

[Filed June 6, 2003]

MARTIN PRUITT, LUCRETIA PRUITT,)
DAVID ELGIN, DANIEL LLEWELLYN,)
and CHERYL LLEWELLYN,)
Plaintiffs,)
)
v.)
)
COMCAST CABLE HOLDINGS, LLC,)
Defendant.)
)

Judge Edward W. Nottingham

ORDER AND MEMORANDUM OF DECISION

This is a case arising under the Cable Communications Policy Act, 47 U.S.C. § 551 (West 2001) [hereinafter the "Cable Act"]. Plaintiffs Martin Pruitt, Lucretia Pruitt, David Elgin, Daniel Llewellyn, and Cheryl Llewellyn

contend that Defendant AT&T Broadband, LLC[1], improperly stored personally identifiable information regarding their pay-per-view purchases and did not properly provide notice of such information storage, in violation of the Cable Act. This matter is before the court on (1) defendant's "Motion for Summary Judgment" filed November 30, 2001, (2) "Plaintiffs' Motion for Summary Judgment" filed November 30, 2001, and (3) "Plaintiffs' Motion to Certify Class Action" filed February 1, 2002. Jurisdiction is based on 28 U.S.C. §§ 1331, 1367 (West 1993).

FACTS

1. General Background

Plaintiffs are past or current subscribers of AT&T Cable Broadband. (Pls.' Mot. for Summ. J., Statement of Undisputed Material Facts ¶ 1 [filed Jan. 25, 2002] [hereinafter "Pls.' Br."]; *admitted in pertinent part at* Resp. to Pls.' Mot. for Summ. J., Resp. to Statement of Undisputed Material Facts ¶ 1 [filed Feb. 14, 2002] [hereinafter "Def.'s Resp."].) In order to receive AT&T digital cable service, subscribers are required to use a special converter box. *(Id.,* Statement of Undisputed Material Facts ¶ 2; *admitted in pertinent part at* Def.'s Resp., Resp. to Statement of Undisputed Material Facts ¶ 2.) AT&T's digital cable converter boxes transmit and store (1) pay-per-view purchase information and (2) system diagnostic information. (Mot. for Summ. J., Statement of

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[1] AT&T Broadband, LLC, is now known as Comcast Cable Holdings, LLC. For convenience, I refer to defendant throughout this order, where necessary, by its former name.

Undisputed Material Facts ¶ 1 [filed Nov. 30, 2001] [hereinafter "Def.'s Br."]; *admitted at* Pls.'s Resp. to Def.'s Mot. for Summ. J., Resp. to Statement of Undisputed Material Facts ¶ 1 [filed Dec. 21, 2001] [hereinafter "Pls.' Resp."].)

The parties dispute whether the information stored on the cable converter boxes is "personally identifiable." *(Id.,* Statement of Undisputed Material Facts ¶ 3; *disputed at* Pls.' Resp., Resp. to Statement of Undisputed Material Facts ¶ 3.) Defendant asserts that the information stored in the memory of the converter boxes contains only the start time of the pay-per-view program and the source identifier for the pay-per-view channel, but does not include the subscribers' name, address, or any other personal identification about the subscriber. *(Id.,* Statement of Undisputed Material Facts ¶ 3.) Plaintiffs, on the other hand, argue that the information is personally identifiable because the converter boxes associate a unique number with the records of subscribers' names and addresses stored in defendant's billing system. (Pls.' Resp., Resp. to Statement of Undisputed Material Facts ¶ 3.) The converter boxes are manufactured by Motorola. (Def.'s Br., Statement of Undisputed Material Facts ¶ 4; *admitted in pertinent part at* Pls.' Resp., Resp. to Statement of Undisputed Material Facts ¶ 4.)

The converter boxes can store up to sixty-four pay-per-view purchases. *(Id.,* Statement of Undisputed Material Facts ¶ 5; *admitted in pertinent part at* Pls.' Resp., Resp. to Statement of Undisputed Material Facts ¶ 5.) After sixty-four pay-per-view purchases, additional pay-per-view purchases overwrite and eliminate the oldest pay-per-view purchase records. *(Id.,* Statement of Undisputed Material Facts ¶ 5; *deemed admitted at* Pls.' Resp., Resp. to

Statement of Undisputed Material Facts ¶ 5.)[2] The parties dispute whether the pay-per-view purchase information stored in the digital cable boxes' memory until subsequently overwritten is necessary for AT&T to resolve billing issues and detect the unauthorized reception of cable service. *(Id.,* Statement of Undisputed Material Facts ¶ 6; *disputed at* Pls.' Resp., Resp. to Statement of Undisputed Material Facts ¶ 6.) The parties also dispute whether it is practical for defendant to erase or destroy the pay-per-view purchase information stored in the converter boxes' memory before it is overwritten. *(Id.,* Statement of Undisputed Material Facts ¶ 7; *disputed at* Pls.' Resp., Resp. to Statement of Undisputed Material Facts ¶ 7.) According to defendant, any change in the way the converter boxes store and overwrite data would require Motorola to rewrite the converter boxes' software. (*Id.*, Statement of Undisputed Material Facts ¶ 7.) Plaintiffs, on the other hand, argue that "[c]orrecting the converter boxes requires only a software change which can be installed over the cable lines." (Pls.' Resp., Resp. to Statement of Undisputed Material Facts ¶ 7.) In any event, the parties agree that the converter

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[2] Plaintiffs dispute defendant's assertion that after sixty-four pay-per-view purchases, newer purchases overwrite older purchases, asserting that "[a]lthough the converter boxes can store up to 64 records of pay-per-view purchases, additional purchases cannot overwrite older records unless those records have been transmitted to the defendant and a signal acknowledging receipt of the records has been received by the converter box." Plaintiffs assert in their own Statement of Undisputed Material Facts, however, that "[t]he converter boxes can only hold up to 64 records regarding [pay-per-view] programs, and older records can be erased by newer records if more than 64 [pay-per-view] programs have been watched." (Pls.' Br., Statement of Undisputed Material Facts ¶ 5.) Accordingly, I deem defendant's statement of fact admitted.

boxes are programmed so that the only way for defendant to erase the information stored on them is by way of a "cold boot" command issued through the box's serial port. (Pls.' Br., Statement of Undisputed Material Facts ¶ 4; *admitted at* Def.'s Resp., Resp. to Statement of Undisputed Material Facts ¶ 4.)

According to defendant, it provides customers with Subscriber Privacy Notices when they begin service, and annually thereafter. (Def.'s Br., Statement of Undisputed Material Facts ¶ 8.) The subscriber notices state that "[a]ccounting and billing records are retained for ten years for tax and accounting purposes or until the relevant income tax years for which the document was created has been closed for income tax purposes and/or all appeals have been exhausted." (Pls.' Br., Ex. C [AT&T Subscriber Privacy Notice at 4].) Defendant's Subscriber Privacy Notices notify subscribers that billing records may be retained for up to ten years. (Def.'s Br., Statement of Undisputed Material Facts ¶ 9; *deemed admitted at* Pls.' Resp., Resp. to Statement of Undisputed Material Facts ¶ 9.)

Plaintiffs Martin and Lucretia Pruitt entered into an agreement with defendant for digital cable service. (Pls.' Br., Statement of Undisputed Material Facts ¶ 12; *admitted at* Def.'s Resp., Resp. to Statement of Undisputed Material Facts ¶ 12.) Because the Pruitts refused to connect the cable converter boxes in their home to their telephone line, defendant provided them with only normal analog cable service, as opposed to the more expensive digital cable service. (*Id.*, Statement of Undisputed Material Facts ¶ 13; *admitted in pertinent part at* Def.'s Resp., Resp. to Statement of Undisputed Material Facts ¶ 13.) Defendant continued to charge the Pruitts for the digital cable service, despite the fact that the Pruitts were receiving only the

analog cable service. (*Id.*, Statement of Undisputed Material Facts ¶ 14; *admitted in pertinent part at* Def.'s Resp., Resp. to Statement of Undisputed Material Facts ¶ 14.) On the advice of their attorney, the Pruitts did not notify defendant of the billing discrepancy and continued to pay for digital cable service. *(Id.,* Ex. D [Lucretia Pruitt Dep. at 69-70].)

2. Procedural History

Plaintiff filed their original complaint on June 16, 2000, and the case was assigned to Judge Walker D. Miller. (Compl. and Jury Demand Including Class Action [filed Jun. 16, 2000].) On September 1, 2000, defendant filed a motion to dismiss certain of plaintiffs' claims. (Mot. to Dismiss Certain Claims [filed Sept. 1, 2000].) On August 7, 2001, Judge Miller granted defendant's motion in part and dismissed two of plaintiffs' claims. (Order on Def.'s Mot. to Dismiss Certain Claims [filed Aug. 7, 2001].) On October 30, 2001, plaintiffs submitted a motion to amend their complaint and dismiss certain claims, which Magistrate Judge Craig B. Schaffer accepted on January 25, 2002. (Courtroom Mins. of 1/25/02.) Plaintiffs' amended complaint asserts three causes of action: (1) violation of 47 U.S.C.A. § 551(e) based on defendant's collecting and recording information on per-per-view programs watched and failing to destroy the information even after it is no longer necessary for the purposes for which it was collected; (2) violation of 47 U.S.C.A. § 551(e) based on defendant's failure to inform subscribers that defendant collects and records information on pay-per-view purchases made by subscribers and does not destroy the information even after it is no longer necessary for the purposes for which it was collected; and (3) state law breach of contract, based on defendant's failure to provide

the Pruitts with digital cable service, even while charging them fees for this service. (Am. Compl. and Jury Demand Including Class Action ¶¶ 32-55 [filed Oct. 30, 2001] [hereinafter "Am. Compl."].)

On November 30, 2001, defendant moved for (1) summary judgment on all plaintiffs' claims and (2) an order denying class certification and striking class allegations. (Def.'s Br. at 1-18.) Also on November 30, 2001, plaintiffs submitted a motion for summary judgment, which Judge Miller accepted on January 25, 2002. (Courtroom Mins. of 1/25/02.) Plaintiffs' motion alleges that, as a matter of law, defendant's actions constitute a violation of the Cable Act. (Pl.'s Br. at 1-8.) On Februay 1, 2002, plaintiffs moved to certify a class action. (Pls.' Mot. to Certify Class Action [filed Feb. 1, 2002] [hereinafter "Pls.' Mot. to Certify Class Action"].) On July 24, 2002, Judge Miller denied defendant's motion to deny class certification and to strike class allegations without prejudice. (Min. Order [filed July 24, 2002].) On August 22, 2002, Judge Miller entered an order recusing himself from the case because of his ownership interest in defendant's owner, the AT&T Corporation. (Order [filed Aug. 22, 2002].) The case was reassigned to this court.

ANALYSIS

1. Legal Standard

Pursuant to rule 56(c) of the Federal Rules of Civil Procedure, the court may grant summary judgment where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the ... moving party is entitled to judgment as a matter

of law." Fed. R. Civ. P. 56(c); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 2511 (1986); *Concrete Works, Inc. v. City & County of Denver*, 36 F.3d 1513, 1517 (10th Cir. 1994). The moving party bears the initial burden of showing an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 2554 (1986). "Once the moving party meets this burden, the burden shifts to the nonmoving party to demonstrate a genuine issue for trial on a material matter." *Concrete Works, Inc.*, 36 F.3d at 1518 (citing *Celotex Corp.*, 477 U.S. at 325, 106 S. Ct. at 2554). The nonmoving party may not rest solely on the allegations in the pleadings, but must instead designate "specific facts showing that there is a genuine issue for trial." *Celotex Corp.*, 477 U.S. at 324, 106 S. Ct. at 2553; *see* Fed. R. Civ. P. 56(e). "'Only disputes over facts that might affect the outcome of the suit under governing law will preclude the entry of summary judgment.'" *Sanchez v. Denver Pub. Schs.*, 164 F.3d 527, 531 (10th Cir. 1998) (quoting *Anderson*, 477 U.S. at 248, 106 S. Ct. at 2505). The court may consider only admissible evidence when ruling on a summary judgment motion. *See World of Sleep, Inc. v. La-Z-Boy ChairCo.*, 756 F.2d 1467, 1474 (10th Cir. 1985). The factual record must be viewed in the light most favorable to the nonmoving party. *Concrete Works, Inc.*, 36 F.3d at 1518 (citing *Applied Generics Int'l, Inc. v. First Affiliated Sec., Inc.*, 912 F.2d 1238, 1241 [10th Cir. 1990]).

2. The Cable Act

In 1984, Congess enacted the Cable Act, establishing national policy and guidelines for the cable television industry. *Scofield v. Telecable of Overland Park, Inc.*, 973 F.2d 874, 876 (10th Cir. 1992). The Cable Act limits cable

companies' collection and use of "personally identifiable information," "such as the subscriber's viewing habits or the nature of the transactions made by the subscriber over the cable system." 47 U.S.C.A. § 551; *Scofield,* 973 F.2d at 876. The Cable Act also limits cable companies' use of such "personally identifiable information." *Scofield,* 973 F.2d at 876. Specifically, the Cable Act provides that:

> At the time of entering into an agreement to provide any cable service or other service to a subscriber and at least once a year thereafter, a cable operator shall provide notice in the form of a separate, written statement to such subscriber which clearly and conspicuously informs the subscriber of—
>
> (A) the nature of personally identifiable information collected or to be collected with respect to the subscriber and the nature of the use of such information;
>
> (B) the nature, frequency, and purpose of any disclosure which may be made of such information, including an identification of the types of persons to whom the disclosures may be made;
>
> (C) the period during which such information will be maintained by the cable operator;
>
> (D) the times and place at which the subscriber may have access to such information in accordance with subsection (d);

47 U.S.C.A. § 551(a)(1). The Cable Act also provides that "a cable operator may use the cable system to collect" personally identifiable information in order to (a) obtain information necessary to provide cable service, and (b) to detect unauthorized cable reception. *Id.* § 551(b). Under the Cable Act, the cable operator must "destroy personally identifiable information if the information is no longer

necessary for the purpose for which it was collected." *Id.* § 551(e). The Cable Act provides for remedies, including (1) actual damages "not less than liquidated damages computed at $100 a day for each day of violation or $1,000, whichever is higher," (2) punitive damages, and (3) reasonable attorneys' fees and costs. *Id.* § 551 (f)(2).

3. The Motions for Summary Judgment

Both parties agree that there are no disputes of material fact and that the case can be decided on the motions for summary judgment. The issues before this court are: (1) whether the information collected and stored on the cable converter boxes is "personally identifiable information," as that term is used by the Cable Act; (2) if the information is "personally identifiable," whether defendant retains the information longer than necessary for the purpose for which it was collected; (3) whether defendant properly notified plaintiffs of the period during which personally identifiable information stored in the converter boxes would be maintained; and (4) whether defendant breached its contract with Plaintiffs Matin and Lucretia Pruitt for digital cable service.

a. Personally Identifiable Information

The crux of this case is whether the pay-per-view information contained in the cable converter boxes is "personally identifiable information," as that term is used in the Cable Act. According to defendant, the information is not personally identifiable and plaintiffs' claims are, therefore, invalid. (Def.'s Br. at 9-11.) Specifically, defendant argues that the information consists of only (a) the start time of the pay-per-view movie or event and (b) the source identification for the pay-per-view channel.

(*Id.*) Defendant alleges that the information does not include the subscriber's name, address, or any other personal information about the subscriber, but is "raw data consisting solely of binary or hexadecimal numbers." (Reply in Supp. of Def.'s Mot. for Summ. J. at 4 [filed Jan. 14, 2002] [hereinafter "Def.'s Reply"].) Plaintiffs, on the other hand, argue that the cable converter boxes store a unique number along with the pay-per-view purchase information, which is used to match the information to the subscriber's name and address in defendant's billing system, making the information personally identifiable. (Pls.' Resp. at 6.)

The Cable Act does not define "personally identifiable information," except to say that "the term 'personally identifiable information' does not include any record of aggregate data which does not identify particular persons ...." 47 U.S.C.A. § 551(a)(2)(A). There is also scant case law on this issue. The case law that does exist, however, indicates that "personally identifiable information" must provide some information about the subscriber to the cable services. *See, e.g., Scofield,* 973 F.2d 874; *Metrovision of Livonia, Inc. v. Wood,* 864 F. Supp. 675, (E.D. Mich. 1994). In *Scofield,* the Tenth Circuit noted that the defendant cable company did not "collect and maintain any personally identifiable information concerning the age, sex, race, income or political affiliation, or any other demographic data of any subscriber." *Id.* at 877. The *Scofield* court also noted that, according to the legislative history of section 551(a)(2) "personally identifiable information 'would include specific information about the subscriber, or a list of names and addresses on which the subscriber is included.'" *Id.* at 876 n.2. Likewise, in *Wood,* the district court held that "the strictures of section 551 were intended to protect the

privacy interests of individual subscribers as it relates to 'details about bank transactions, shopping habits, political contributions, viewing habits and other significant personal decisions.'" *Metrovision,* 864 F. Supp. at 681.

I conclude that the information stored on the cable converter boxes is not "personally identifiable information." Kevin Taylor, an engineer for defendant with knowledge of and experience with the cable converter boxes at issue, testified that the information stored on the cable converter boxes is raw data, consisting of a series of numbers and letters. (Mot. for Leave to Supplement the Record, Taylor Decl. ¶¶ 9-10 [filed Jan. 17, 2002] [hereinafter "Def.'s Mot. to Supplement"].) The cable converter boxes do not contain the subscriber's name, address, or any other information that could be associated with a particular subscriber. (*Id.*, Taylor Decl. ¶ 18 [filed Jan. 17, 2002].) In short, the cable converter boxes contain absolutely no information about even the subscriber's identity, much less further information about the subscriber's viewing habits or other personal information. Raw data consisting solely of numbers and letters, without any connection to a subscriber's name or address, cannot be considered personally identifiable information. As in *Scofield,* the cable converter boxes do not "collect and maintain any personally identifiable information concerning the age, sex, race, income or political affiliation, or any other demographic data of any subscriber." *See Scofield,* 973 F.2d at 877. The raw data simply cannot infringe on "the privacy interests of individual subscribers as it relates to 'details about bank transactions, shopping habits, political contributions, viewing habits and other significant personal decisions.'" *See Metrovision,* 864 F. Supp. at 681. As defendant points out, even if all the information contained in the cable converter boxes was printed on the

front page of the newspaper, it offer no information about the subscriber or his or her viewing habits or other personal decisions. As such, I find the information stored on the cable converter boxes more akin to "aggegate data which does not identify particular persons." *See* 47 U.S.C.A. § 551(a)(2)(A).

I am not persuaded by plaintiffs' argument that the information stored on the cable converter boxes is personally identifiable because "defendant has the ability to match the data stored on the converter boxes to particular customers." (Pls.' Br. at 5.) The cable converter box information is not combined with a subscriber's name, address, or account number, except in defendant's billing system. (Def.'s Mot. to Supplement, Taylor Decl. ¶¶ 19-20.) Instead, the cable converter box has a unit address, which identifies only the particular cable converter box, but not the particular user. (*Id.*, Taylor Decl. ¶ 19; Pls.' Submission of Confidential Materials Filed Under Seal, Ex. A [Taylor Dep. at 35-36] [hereinafter "Pls.' Confidential Materials"].) Only in defendant's billing system is the unit address and the user's account connected so that billing can occur. (Def.'s Mot. to Supplement, Taylor Decl ¶ 20; P1.'s Confidential Materials, Ex. A [Taylor Dep. at 35-36].) Plaintiffs' complaint deals solely with "the information collected and stored by the converter boxes." (Am. Compl. ¶¶ 1-43.) Plaintiffs have not made any allegations that defendant's billing system violates the Cable Act. I conclude, therefore, that the information collected by the cable converter box is not "personally

identifiable information." Accordingly, I grant defendant's motion for summary judgment.[3]

b. Subscriber Privacy Notices

Plaintiffs have also asserted a claim under 47 U.S.C.A. § 551(a)(1)(C), alleging that defendant's disclosures do not comply with the Act. (Am. Compl. ¶¶ 38-43.) According to plaintiffs, personally identifiable information regarding what pay-per-view shows were watched and when the shows were watched remains in the converter boxes indefinitely. (Pls.' Br. at 6-7.) Because I have already determined that the information stored on the cable converter boxes is not personally identifiable, I conclude that summary judgment in favor of defendant is appropriate on plaintiffs' section 551(a)(1)(C) claim as well.

c. Breach of Contract

In addition to their federal claims, the Pruitts have asserted a state law breach of contract claim against defendant. Where a district court has dismissed all claims over which it has original jurisdiction, 28 U.S.C.A. § 1367(c)(3) expressly authorizes the court to decline to exercise supplemental jurisdiction over the remaining state-law claims. 28 U.S.C.A. § 1367(c)(3). Whether to exercise supplemental jurisdiction under such circumstances lies within the discretion of the court. *Medina v. City of Osawatomie,* 992 F. Supp. 1269, 1279 (D. Kan. 1998).

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[3] Because I have found that the information stored on the cable converter boxes is not "personally identifiable information," I need not address the issue of whether defendant stores such material longer than necessary for the purposes for which it is collected.

"Discretion to try state law claims in the absence of any federal claims should only be exercised in those cases in which, given the nature and extent of pretrial proceedings, judicial economy, convenience, and fairness would be served by retaining jurisdiction. *Id.* (citing *Thatcher Enter. v. Cache Corp.*, 902 F.2d 1472, 1478 [10th Cir. 1990]). As a general rule, the balance of factors to be considered will point towards declining to exercise jurisdiction over state-law claims when the federal claims have been eliminated prior to trial. *Carnegie-Mellon Univ. v. Cohill,* 484 U.S. 343, 350 n.7, 108 S. Ct. 614, 619 n.7 (1988). "Notions of comity and federalism demand that a state court try its own lawsuits, absent compelling reasons to the contrary." *Thatcher Enter.*, 902 F.2d at 1478.

In this case, plaintiffs' federal claims have been resolved. I find that there exists no compelling reason to exercise supplemental jurisdiction over plaintiffs' state-law claims and determine that interests of comity and federalism dictate that these claims be heard in state court. Accordingly, plaintiffs' third claim for breach of contract is dismissed without prejudice.

4. Conclusion

Based on the foregoing it is therefore

ORDERED as follows:

1. Defendant's motion for summary judgment (#58) is GRANTED. The clerk shall forthwith enter judgment in favor of defendant and against plaintiffs, dismissing all claims, ***except*** the third claim, with prejudice.

2. Plaintiffs' motion for summalv judgment (#57-1) is DENIED.

3. This case is hereby dismissed without prejudice as to plaintiffs' third claim.

4. All other motions, including plaintiffs' motion to certify class action (#91), are DENIED as moot.

Dated this 6 day of June, 2003.

BY THE COURT

/s/ _____
EDWARD W. NOTTINGHAM
United States District Judge

(3)

No. 04-308

Supreme Court, U.S.
FILED
NOV 3 - 2004
OFFICE OF THE CLERK

In The

Supreme Court of the United States

MARTIN PRUITT, LUCRETIA PRUITT, DAVID ELGIN, DANIEL LLEWELLYN AND CHERYL LLEWELLYN,

Petitioners,

v.

COMCAST CABLE HOLDINGS, LLC,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Tenth Circuit err in determining that numerical data electronically stored in Respondent's digital cable converter boxes is not "personally identifiable information," as that term is used in the subscriber privacy provisions of the Cable Communications Policy Act ("Cable Act"), 47 U.S.C. § 551, where Petitioners did not allege that the collection of personal information in Respondent's billing system violated the Cable Act, Petitioners conceded that the data stored in the converter boxes does not contain the name, address or any information regarding customers, and the Tenth Circuit found that the data stored in the converter boxes is merely a series of numbers?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent hereby discloses that Comcast Cable Holdings, LLC, formerly known as AT&T Broadband, LLC, is a subsidiary of Comcast Cable Communications Holdings, LLC, which is a wholly-owned subsidiary of Comcast Corporation. Comcast Corporation is a publicly-held company. No other publicly-held entity owns ten percent or more of Comcast Cable Holdings, LLC.

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STATEMENT OF THE CASE

Petitioners' federal claims were brought under the subscriber privacy provisions of the Cable Communications Policy Act ("Cable Act"), 47 U.S.C. § 551. Petitioners' Amended Complaint did not allege that Respondent improperly collected, used, disclosed or retained any personally identifiable information about Respondent's cable television subscribers, such as names, addresses, social security numbers, credit histories, etc., that Respondent collects in the normal course of business and keeps in its billing system. Instead, Petitioners' claims focus on the digital cable converter boxes in subscribers' homes through which, *inter alia*, a subscriber may purchase a Pay-Per-View ("PPV") movie or event. The converter boxes store in their electronic memory certain numerical data regarding PPV purchases. *See* Appendix to Petition for Writ of Certiorari ("App.") 10a. This case does not involve any claim that Respondent improperly *collected* or *used* the data stored in the converter boxes. Indeed, collecting and using such data is necessary to render the PPV service to subscribers, and is expressly authorized by the Cable Act. *See* 47 U.S.C. § 551(b)(2). This case solely involves the allegation that Respondent *retained* the data in the converter boxes longer than was necessary because the converter boxes are programmed to retain the data for sixty-four purchases before the oldest data is overwritten by a subsequent purchase. *See* App. 11a. The District Court concluded that the information in the converter boxes is not "personally identifiable information" subject to § 551, and granted summary judgment for Respondent. *See* App. 22a. The Court of Appeals affirmed. *See* App. 8a.

The record evidence included testimony "that the information stored on the cable converter boxes is raw data, consisting of a series of numbers and letters." App. 20a. For example, the data on one PPV purchase looks like this if printed out from the converter box: "06 3A 9B 26 1C E0 28 3A 9B 00 62 21 C4 33 63 BB 5D 16 0E 62 CD 00." Exhibit A to Declaration of Kevin Taylor, Appendix to Appellant's Brief (in Court of Appeals Case No. 03-1297), p. PA 134. The District Court found that "the cable converter boxes contain absolutely no information about even the subscriber's identity, much less further information about the subscriber's viewing habits or other personal information." *Id.* The District Court concluded that "even if all the information contained in the cable converter boxes was printed on the front page of the newspaper, it [would] offer no information about the subscriber or his or her viewing habits or other personal decisions." App. 20a-21a.

The District Court rejected Petitioners' argument that the data in the converter boxes should be considered to be personally identifiable information merely because the "unit address" of a particular converter box can be related to a particular customer in Respondent's billing system. *See* App. 21a. "Only in [Respondent's] billing system is the unit address and the user's account connected so that billing can occur." *Id.* The District Court found it significant that Petitioners' complaint "deals solely with 'the information collected and stored by the converter boxes.'" *Id.* (quoting Am. Compl. ¶¶ 1-43). "Plaintiffs have not made any allegations that [Respondent's] billing system violates the Cable Act." *Id.* Thus, the District Court concluded that the information at issue in this case is not "personally identifiable information." App. 21a-22a. Since

the Cable Act's privacy provisions only pertain to "personally identifiable information," *see* 47 U.S.C. § 551, the District Court granted summary judgment for Respondent.

The Court of Appeals agreed with the District Court's factual findings, and the outcome dictated by those factual findings. The Court of Appeals stated that "[e]ach converter box contains a code displayed in hexadecimal format indicating the date of a pay-per-view purchase and a source identifier for the pay-per-view channel,"[1] and other codes, also in hexadecimal format, "signifying the total number of purchases and payments generated through that particular box." App. 3a. The Court of Appeals agreed with the District Court that "the converter box code – without more – **provides nothing but a series of numbers**." App. 6a (emphasis added). The Court of Appeals noted that Petitioners "concede the information in the converter boxes does not contain the name, address or any information regarding the customer." App. 5a. While recognizing that Respondent's billing system contains personally identifiable information about cable customers, the Court of Appeals emphasized that "[Petitioners] made no claim in their briefs or at oral argument that the collection of information in the billing system violates the Cable Act." App. 6a. Furthermore, Petitioners

[1] Petitioners misstate the Court of Appeals' findings. Petitioners state that "[t]he information collected by and stored in the converter boxes reveals the dates and times of pay-per-view purchases and the pay-per-view channels watched." Petition for Writ of Certiorari ("Pet.") at 2 (citing App. 3a). In fact, it does not reveal dates, times or channels watched. As the Court of Appeals found, the data in the converter boxes is merely "a code displayed in hexadecimal format." App. 3a. By itself, that code reveals nothing but a series of numbers. *See* App. 6a.

never alleged "that the retention of data in the billing . . . system[] violates the Cable Act." App. 7a. Given these facts, and these concessions by Petitioners, the Court of Appeals affirmed the summary judgment entered in favor of Respondent. *See* App. 8a.

REASONS FOR DENYING THE PETITION

There is no compelling reason for the Court to review the decision below. The Tenth Circuit's decision does not conflict with a decision of this Court, any Court of Appeals, or any other court. Petitioners' attempt to portray this case as one where the Court of Appeals has decided an important question of federal law that should be decided by this Court rings hollow. In fact, the decision below simply represents the Tenth Circuit's application of a properly stated rule of law to the specific facts before it.

I. The Decision Below Is Fact-Specific

The Court of Appeals' decision was based on the specific facts of this case. Based on the depositions, affidavits and other evidence in the record, including the exhibit to Mr. Taylor's Declaration showing the data at issue looks like "06 3A 9B 26 1C E0 28 3A . . . ," Appendix to Appellant's Brief below at p. PA 134, the Tenth Circuit agreed with the District Court that the information at issue in this case – the PPV data stored in the converter box – "provides nothing but a series of numbers." App. 6a. This factual finding is not worthy of review by this Court.

The facts also dictated the rejection of Petitioners' argument that the numbers in the converter boxes are

"personally identifiable information" because they can be associated with a specific subscriber in Respondent's billing system. The unit address "identifies only the particular cable converter box, but not the particular user." App. 21a. Moreover, the Court of Appeals found:

> Without the information in the billing . . . system one cannot connect the unit address with a specific customer; without the billing information, even Comcast would be unable to identify which individual household was associated with the raw data in the converter box. Consequently, it is the billing system that holds the key to obtaining personally identifiable information, not the converter box.

App. 6a. This finding also is so fact-bound that it simply is not appropriate for this Court's review.

II. There Is No Need For This Court To Define The Term "Personally Identifiable Information"

The Cable Act does not expressly define the term "personally identifiable information." It does, however, provide that "the term 'personally identifiable information' does not include any record of aggregate data which does not identify particular persons." 47 U.S.C. § 551(a)(2)(A). Furthermore, the Cable Act's "legislative history states that personally identifiable information 'would include specific information about the subscriber, or a list of names and addresses on which the subscriber is included.'" *Scofield v. TeleCable of Overland Park, Inc.*, 973 F.2d 874, 876 n.2 (10th Cir. 1992) (quoting H.R. Rep. No. 934, 98th Cong., 2d Sess. 79, 1984 U.S.C.C.A.N. 4655, 4716).

Petitioners present no compelling reason why this Court should address the meaning of the term "personally identifiable information." The definition of that term is sufficiently clear. Both the Court of Appeals and the District Court had no trouble understanding its meaning. *See* App. 4a-5a; App. 19a-20a. Petitioners cite only two reported cases addressing the term. *See* Pet. at 5 (citing *Scofield*, 973 F.2d 874 and *Metrovision of Livonia, Inc. v. Wood*, 864 F. Supp. 675 (E.D. Mich. 1994)).[2] The dearth of cases on this issue strongly suggests that it is not of sufficient importance to require this Court's attention. In any event, this Court's jurisprudence suggests that this Court should not address this issue until it is more developed in the lower courts.

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[2] Petitioners suggest that there is a "conflict" between *Scofield* and *Metrovision*. *See* Pet. at 5. Not so. Both *Scofield* and *Metrovision* cited the Cable Act's legislative history regarding its privacy provisions. *See* 973 F.2d at 876 n.1; 864 F. Supp. at 681. It is true, as Petitioners state, *see* Pet. at 5, that the *Metrovision* court suggested that information on what cable programs a particular subscriber watched would implicate the Cable Act's privacy provisions. However, Petitioners paint with far too broad a brush when they assert that this "is [the] exact same type of information which is at issue in this matter." Pet. at 5. This completely ignores the fact that the *only* information at issue in this case – the raw data stored in Respondent's converter boxes – is "nothing but a series of numbers," App. 6a, which if published on the front page of the newspaper would reveal "no information about the subscriber or his or her viewing habits or other personal decisions," App. 21a. Petitioners' argument also ignores the fact that the unit address of the converter box "identifies only the particular cable converter box, but not the particular user." App. 21a. The record makes clear that the data at issue in this case implicates no legitimate privacy concerns.

III. Petitioners Misstate the Impact of the Decision Below

Petitioners' arguments that the decision below will nullify the privacy provisions of the Cable Act and impose heightened pleading requirements to assert Cable Act claims are without merit.

A. The Decision Below Does Not "Nullify" Privacy Protections

Petitioners suggest that the decision below allows a cable company to circumvent the Cable Act's privacy provisions by linking personal information "to subscribers' names and addresses by means of some identifier such as a unit address or an account number, rather than store it in the same physical record." Pet. at 6. That assertion both ignores the facts of this case and states too much. Petitioners cannot escape the fact that they *chose* to bring only narrow claims solely concerning the PPV data stored in the converter boxes. However, nothing in the decision below would prevent other cable subscribers from suing a cable company for collecting, using, disclosing or not destroying personally identifiable information in violation of § 551, regardless of how it was identified or where it was stored. The decision below in no way undermines subscriber privacy. Rather, the decision below acknowledges the simple fact that the series of numbers stored in the converter boxes in this case is not personally identifiable information under the Cable Act.

B. The Decision Below Does Not Require "Bad Faith" Allegations

Petitioners misstate the decisions below and incorrectly suggest that the District Court and the Court of

Appeals held that Petitioners were *required* to allege that retaining subscribers' names and addresses in the billing system violated the Cable Act. *See* Pet. at 7. That is not correct. In fact, neither court below said such allegations were *required*; they simply pointed out that in this case, Petitioners *chose* not to make any such allegations. *See* App. 21a; App. 7a. Petitioners cannot blame the District Court and the Court of Appeals for their own decision (which was dictated by the facts of this case) not to make any allegations that Respondent mishandled any personal information in its billing system.

C. The Decision Below Does Not Violate Rule 8(a)

Petitioners' final argument is that the Court of Appeals' decision somehow violates the notice pleading standard of Fed. R. Civ. P. 8(a). *See* Pet. at 7-8. This argument rests on a fundamental misstatement of the basis for the decisions below. This case was not, as Petitioners suggest, *see* Pet. at 3, decided at the pleading stage on a motion to dismiss. Rather, after depositions, discovery and the submission of affidavits and other evidence, this case was decided on summary judgment under Fed. R. Civ. P. 56. *See* App. 22a. There is simply nothing but hollow air to Petitioners' attempt to suggest that the decision in this case implicates Rule 8(a) or imposes a heightened pleading standard for Cable Act privacy claims.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Dated: November 3, 2004.

Respectfully submitted,

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(2)

Supreme Court, U.S.
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No. 04-308

In the Supreme Court of the United States

MARTIN PRUITT, LUCRETIA PRUITT, DAVID ELGIN, DANIEL LLEWELLYN AND CHERYL LLEWELLYN,
Petitioners,

v.

COMCAST CABLE HOLDINGS, LLC,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITIONERS' REPLY BRIEF

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INTRODUCTION

The United States Court of Appeals for the Tenth Circuit created a new standard under the Cable Communications Policy Act, 47 U.S.C. § 521 *et. seq.* (the "Cable Act"), whereby information about a cable subscriber's viewing habits is not considered to be "personally identifiable information," even though it is possible to identify the person to whom the information relates, if the subscriber's name and address is stored in a separate location from the information revealing his viewing habits. This standard, which is not found in the Cable Act, serves to nullify every privacy protection contained therein by allowing cable companies to easily circumvent those protections. The Respondent, however, attempts to recast the issues submitted for review. In such regard, the Respondent cites from a document, which was not before this Court, in order to falsely portray the information at issue as being "merely a series of numbers." (Opposition, p. i., Question Presented).

The full text of the document cited by the Respondent, establishes that the information at issue in this case is not "merely" a series of numbers. Instead, the document verifies that the Respondent's cable converter boxes keep records of every pay-per-view channel watched by its subscribers. The fact, however, that the Respondent is able to use the Court of Appeals' opinion to argue that the term "personally identifiable information" does not include particular subscribers' viewing habits, confirms that the opinion nullifies the privacy protections afforded by the Cable Act.

Congress emphasized the importance of protecting the privacy of cable subscribers in passing national cable legislation. H.R.Rep. No. 934, 98th Cong., 2d Sess. 29 (1984) U.S.Code Cong. & Admin. News 1984, p. 4667.

Unless the Supreme Court acts to correct the Court of Appeals' ruling, the privacy protections of the Cable Act will have no effect, and the cable industry will have been given free reign to violate the privacy of all of its subscribers.

ARGUMENTS IN REPLY

I. THE FULL DOCUMENT RELIED UPON BY THE RESPONDENT ESTABLISHES THAT ALL ELECTRONIC INFORMATION CAN BE REPRESENTED AS A SERIES OF NUMBERS, AND THAT THE INFORMATION AT ISSUE HEREIN REVEALS A CABLE SUBSCRIBER'S VIEWING HABITS.

The Respondent quotes from a document which was not before this Court, in an apparent effort to make the information stored in its converter boxes appear to be a meaningless series of numbers. In order to correct the misconception created by the Respondent, the Petitioners have included a full copy of the document in the supplemental appendix attached hereto. See Appendix 1, 1b - 9b. The document is a declaration of the Respondent's expert witness and employee, Kevin Taylor. App. 1b - 2b, paras. 3 and 4. Viewed in its entirety, the document negates the Respondent's arguments. In such regard, the declaration establishes the following facts:

- All electronic data consists of a series of zeros and ones, known as binary numbers. App. 2b, para. 9.

- Electronic devices are commonly programmed to represent binary data as a series of letters and numbers, known as hexadecimal format. App. 2b, para. 10.

- Stored in the memory of each converter box is the total number of pay-per-view purchases made through the box, App. 3b, para. 13, the start time of each purchased pay-per-view movie or event, App. 3b, para. 16a, and the pay-per-view channel on which each purchased movie or event was carried, App. 3b, para. 16b.[1]

In other words, there is nothing unique about the information at issue in this case. Any and all electronic information consists of a series of ones and zeroes, and, therefore, can be represented in hexadecimal format. This includes any information which could be collected or stored by any cable system or which could be stored in the computer systems of any cable company. The fact that the electronic information at issue in this case can be printed out in a hexadecimal format does not mean that it is a meaningless series of numbers. To the contrary, as shown by the declaration, regardless of the format in which it is printed, the information in the converter boxes reveals how many pay-per-view programs a subscriber watched, what channels he watched, and when he watched them. App. 3b, paras. 13 and 16.

II. THE RESPONDENT'S ARGUMENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI ARE NOT VALID.

The Respondent argues that the Petitioners have overstated the impact of the Court of Appeals' opinion, and that the opinion is fact specific. This is refuted by a simple example.

---

[1] Paragraph 16 of the declaration, App. 3b, directly contradicts the Respondent's disingenuous claim that the information does not reveal dates, times or channels watched. See Opp. p. 3, fn 1.

47 U.S.C. § 551(b) of the Cable Act is solely directed to the use of a cable system to collect personally identifiable information. Since, by its very nature, a cable system is electronic, any information which it can collect can be represented in a hexadecimal format. Under the Respondent's analysis, such information would simply be a series of numbers and, therefore, could not be personally identifiable information. As such, § 551(b) would have absolutely no valid application. In fact, as noted above, this same logic applies to any information stored in either a cable system or a cable company's computers. It is difficult to see how the Petitioners could have overstated the impact of the Court of Appeal's opinion, when the application of the Respondent's own interpretation of that opinion would nullify every privacy protection afforded by the Cable Act.

The Respondent also unsuccessfully attempts to resolve the conflict between the Court of Appeal's ruling and the opinion in *Metrovision of Livonia, Inc. v. Wood*, 864 F.Supp. 675 (E.D. Mich. 1994). In *Metrovision*, the court listed "information showing that a particular subscriber watches three hours of the Playboy Channel every night followed by two hours of a pay-per-view Wrestlemania contest" as an example of personally identifiable information. *Id.*, at 681, fn. 3. If a cable subscriber watched these exact same shows on the Respondent's cable system, the converter boxes in the subscriber's home would keep a record of each show, App. 3b, para. 13, and would record exactly what channels were watched, App. 3b, para. 16a, and when they were watched, App. 3b, para. 16b. Moreover, since the information in the example in *Metrovision* would have been electronic, it too could have been represented in a hexadecimal format. App. 2b, paras. 9 and 10.

Finally, the Respondent misconstrues the Petitioners' position regarding the additional requirements imposed by the Court of Appeals. Contrary to the Respondent's argument, the Court of Appeals specifically held that, absent any allegation that retention of data in the billing system violates the Cable Act, the information in the converter boxes is not personally identifiable. App. 7a. As discussed in the Petition, such data involves subscribers' names and addresses, which are validly kept for billing purposes. Names and addresses, however, do not reveal a subscriber's viewing habits. The information which reveals viewing habits is stored in the converter boxes, and can be matched to legitimate records in the billing system in order to identify the subscriber to which the pay-per-view information relates. It is simply not a violation of the Cable Act for a cable company to maintain its customers' names and addresses for billing purposes, and any allegation to the contrary could not have been made in good faith. The result of the Court of Appeals' ruling is, that so long as a cable company stores identifying information in its billing computers, it is free to use its cable system to peer in on its customers and collect and store absolutely any personal information about them, including information on bank transactions, shopping habits, political contributions, viewing habits and any other significant personal decisions. *See Scofield*, 973 F.2d at 876 (quoting H.R.Rep. No. 934, 98th Cong., 2d Sess. 29 (1984) U.S.Code Cong. & Admin. News 1984, p. 4666).

CONCLUSION

For the reasons as stated above, and in the Petition for Writ of Certiorari, the Petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted

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APPENDIX 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 00-WM- 1250

MARTIN PRUITT, LUCRETIA PRUITT,)
DAVID ELGIN, DANIEL LLEWELLYN)
and CHERYL LLEWELLYN,)
Plaintiffs,)
)
v.)
)
AT&T BROADBAND, LLC,)
Defendant.)
)

DECLARATION OF KEVIN TAYLOR

I, Kevin Taylor, hereby state under oath as follows:

1. I am over the age of eighteen years and competent to testify.

2. I have personal knowledge of the facts stated herein.

3. I am employed by AT&T Broadband, LLC ("AT&T Broadband"). I have extensive knowledge of and experience with the Motorola DCT converter boxes at issue in this case.

4. I previously provided a written expert report, and twice gave deposition testimony in this case.

5. To gather information to support AT&T Broadband's position in this case, AT&T Broadband recently attempted to poll the converter box in the home of Mr. David Elgin, who is one of the plaintiffs in this case. However, Mr. Elgin's converter box did not respond, so no Pay-Per-View ("PPV") purchase data could be retrieved from his box. The fact that the box is not responding most likely is because it was disconnected from the telephone line.

6. After it was determined that Mr. Elgin's converter box was not responding, AT&T Broadband obtained PPV purchase information from a test converter box. That data was not received until January 15, 2002.

7. Attached hereto as Exhibit A is a true and correct copy of the PPV purchase data that was obtained from the test converter box.

8. The Exhibit A data is an example of the type of data that is stored in the electronic memory of the Motorola converter boxes concerning PPV purchases made by digital cable subscribers in Colorado.

9. Like all electronic data, the data stored in the converter boxes, at its most basic level, is a series of zeros and ones (binary numbers).

10. Electronic devices commonly are programmed to represent binary data in hexadecimal format (a series of letters and numbers). On Exhibit A, each pair of letters and/or numbers (e.g., 06, 3A, 9B, 28, etc.) represent a string of eight zeros and ones or one byte of data.

11. The diagnostics program that runs within the converter boxes at issue in this case was programmed by Motorola to display the areas of memory containing PPV purchase data in hexadecimal format.

12. The Exhibit A data is displayed in hexadecimal format. This is the format of the data as it was delivered out of the test converter box.

13. The "View History Queue Header" data on Exhibit A, to the best of my knowledge, includes the total number of PPV purchases made through this converter box.

14. The "VH Queue DebitAuthData" data on Exhibit A, to the best of my knowledge, is a digital authentication that is part of the security protocol.

15. The "Purchase Report Acknowledge Array" data on Exhibit A is a record of which PPV purchases were reported back to the billing system in response to a particular polling request.

16. The "Entries 0 to 7" on Exhibit A are the PPV purchase data stored in the electronic memory of the test converter box. This data relates to eight PPV purchases. This data consists of:

a. The start time of each purchased PPV movie or event, which is a number representing the number of seconds since January 1, 1970; and

b. The source identifier, which is a number representing which PPV channel each purchased PPV movie or event was carried

on. For example, the source identifier for In-Demand 1 is a number such as 1001.

17. The zeroes in entries 8 through 63 reflect that this converter box has only processed eight PPV purchases and there are no other entries.

18. The digital cable converter boxes in use in Colorado do not collect, transmit, receive or store subscribers' names, addresses, account numbers or other personal identifying information.

19. Each digital cable converter box in use in Colorado has a unique number representing its unit address or unit number. The unit number is stored in another area of memory in the converter box, and therefore is not included in the data on Exhibit A.

20. The data stored in the converter boxes is not associated with a subscriber's account unless and until the data has been transmitted from the converter box through the Headend Management System ("HMS") and the Access Control System ("AC") to AT&T Broadband's billing system. The billing system is the only place where the PPV purchase data from the converter box is combined with a subscriber's name, address and account number.

I hereby declare under the penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

/s/_____

Kevin N. Taylor

Date: January 17, 2002

EXHIBIT A

History Queues.txt

06.73> Q
------View History Queue Header:
01 03 08 07 07 00 99 01 00 00 00 08 01 03 08 07
07 00 99 01 00 00 00 08 9A 9A 00 00 02 3A CE 29
5B A9 68 3A CE 00 00 00 00 00 00 00 00 00 00 00
97 00 3C ED 78 E4 75 63 DE 59 00 00 10 5C 00 00
08 B3 00 04 00 00 72 04 00 00 48 00 06 3A 9B 26
1C E0

------VH Queue DebitAuthData:
3C ED 78 E4 75 63 DE 59 00 00 10 5C 00 00 08 B3
00 04 00 00 72 04 00 00 48 00

------Purchase Report Acknowledge Array
1A 54 07 00 1A 56 07 00 1A 3E 07 00 1A 41 07 00
1A 45 07 00 1A 48 07 00 1A 4B 07 00 1A 4F 07 00

------Entries 0 to 7:
06 3A 9B 26 1C E0 28 3A 9B 00 62 21 C4 33 63 BB 5D 16
0E 62 6D 00 06 3A 98 27 5B F9 38 3A 98 00 B8 9A DF 45
8B 4A F2 0B 15 28 95 00 02 3A 9B 28 42 93 98 3A 9B 00 00
00 00 00 00 00 00 00 15 AF 09 00 02 3A B5 28 4A 13 20 3A
B5 00 00 00 00 00 00 00 00 00 15 D1 66 00 02 3A A8 28 4B
F1 40 3A A8 00 00 00 00 00 00 00 00 00 1A 20 E3 00 02 3A
AF 29 56 40 40 3A AF 00 00 00 00 00 00 00 00 00 1A 23 47
00 02 3A A7 29 57 AD E0 3A A7 00 00 00 00 00 00 00 00 00
00 1A 2D 1E 00 02 3A CE 29 5B A9 68 3A CE 00 00 00 00
00 00 00 00 00 1A 56 97 00

------Entries 8 to 15:

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------Entries 16 to 23:

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History Queues.txt

------Entries 24 to 31:

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------Entries 32 to 39:

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------Entries 40 to 47:

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------Entries 48 to 55:

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------Entries 56 to 63:
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